Supervalu Holdings, Inc. d/b/a Bigg's Foods *and* United Food and Commercial Workers International Union, Local 1099.[1] Cases 9–CA–39206, 9–CA–39696, 9–CA–38747 and 9–CA–39994

June 23, 2006

DECISION AND ORDER

BY MEMBERS LIEBMAN, KIRSANOW, AND WALSH

On September 26, 2003, Administrative Law Judge Arthur J. Amchan issued the attached decision.[2] The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party separately filed limited cross-exceptions and answering briefs. The Respondent filed an answering brief to the cross-exceptions and a separate reply brief to the answering briefs of the General Counsel and the Charging Party.[3]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[4] and conclusions and to adopt the recommended Order as modified below.[5]

This case principally concerns the Respondent's oral amendment of its written no-distribution rule, its subsequent enforcement of that amended rule, and the discipline it imposed on employees under the amended rule.[6] For the reasons stated by the judge, as well as the reasons stated below, we adopt the judge's findings that the Respondent violated Section 8(a)(1) when it orally amended its written no-distribution rule in response to its off-duty employees' union handbilling activities[7] and prohibited off-duty employees from distributing union handbills to customers.[8] We also adopt the judge's findings that the

[1] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL–CIO effective July 29, 2005.

[2] On October 14, 2003, the judge issued a substitute notice for that attached to his September 26, 2003 decision.

[3] There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by tape recording a conversation with and interrogating an employee on February 26, 2002; promulgating a rule prohibiting employees from wearing union pins during working time; and maintaining and enforcing a rule prohibiting employees from entering its facilities (unless shopping) more than 10 minutes prior to the start of their scheduled shift or remaining for more than 10 minutes after the end of their scheduled shifts. Similarly, there were no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by suspending employee Tina Morgan on March 8, 2002.

[4] In finding that the Respondent unlawfully maintained an overbroad confidentiality rule, we adopt the judge's analysis and additionally rely on *Cintas Corp.*, 344 NLRB No. 118, slip op. at 1 (2005). There, the Board found unlawful a confidentiality rule because employees could reasonably construe it as prohibiting Sec. 7 activity. A like analysis applies here. As the judge found, employees could reasonably understand the Respondent's confidentiality rule, which prohibits disclosure of, among other things, salaries to "anyone outside the company," as prohibiting discussion of salaries with union representatives.

Member Kirsanow appreciates that the Respondent and employers generally have a legitimate interest in safeguarding their confidential information from disclosure to competitors. In finding, with his colleagues, that the Respondent's confidentiality rule violates the Act, he observes that nothing in the Board's Order precludes the Respondent from modifying its confidentiality policy "so that its interests are protected and the employees' Sec. 7 rights are not violated." *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1260 (10th Cir. 2005), cert. denied 126 S.Ct. 1331 (2006).

[5] We shall modify the judge's recommended Order to conform to the Board's standard remedial language. We shall also conform the notice to the Order.

[6] In his decision, the judge also discussed exceptions to the Respondent's written no-distribution rule that gave store managers some discretion to permit charitable distributions. Although certain aspects of the judge's decision could be read to suggest that he found the Respondent's written no-distribution policy unlawful on this basis, the decision as a whole does not support that interpretation. The judge did not include such a violation in his conclusions of law (nor, for that matter, did he include a remedy for such a violation in his recommended Order), and there were no exceptions to the judge's failure to do so. The General Counsel also did not include an allegation in the complaint that the Respondent's written rule was facially unlawful on this basis. Thus, we find it unnecessary to pass on this aspect of the judge's decision.

[7] The Respondent's written no-distribution rules provide in pertinent part (rule 2) that "[e]mployees may not distribute materials to other employees in working areas of the business." The written rules do not mention distribution to customers. On April 15, 2002, at the Florence, Kentucky store, employee Tina Morgan was told that she could not distribute union handbills to customers in an area that was approximately 10 feet away from products on display. Later that same day at the Union Centre store, Morgan was given a similar directive while handbilling to customers approximately 20–25 feet away from products on display. The next day, at the Western Hills store, Morgan was told that she could not handbill to customers anywhere in the shopping plaza. We agree with the judge that the Respondent amended its written rule in response to its employees' union activities. Moreover, we additionally find that the Respondent did not clearly communicate to its employees the scope of the oral amendment to its written no-distribution rule. In these circumstances, a reasonable employee would not know what conduct was prohibited by the orally amended rule. Consequently, the amended no-distribution rule was also ambiguously overbroad as to the areas where handbilling to customers was not permitted. See *Guardsmark, LLC*, 344 NLRB No. 97, slip op. at 3 fn. 6 (2005) (Member Liebman dissenting in part on other grounds; Member Schaumber dissenting in relevant part) (where a no-solicitation rule is ambiguous, the ambiguity is resolved against the employer, the promulgator of the rule). Although the Respondent later sought to clarify the scope of the rule, those clarifications were communicated only to employees engaged in handbilling. To be effective, a narrowing interpretation of an overly broad rule must be communicated to the entire work force covered by the rule. *Guardsmark*, supra, 344 NLRB slip op. at 3; *Chicago Magnesium Castings Co.*, 240 NLRB 400, 403-404 (1979), enfd. 612 F.2d 1028 (7th Cir. 1980).

[8] Although the judge cited *Tri-County Medical Center*, 222 NLRB 1089 (1976), in his decision, he analyzed the case under *Santa Fe Hotel & Casino*, 331 NLRB 723 (2000). Because this case does not concern

Respondent violated Section 8(a)(3) and (1) by disciplining employees Amy Roberson, Helen Reardon,[9] and Karen Brown.[10]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Supervalu Holdings, Inc. d/b/a Bigg's Foods, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(h).

"(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. June 23, 2006

Wilma B. Liebman, Member

Peter N. Kirsanow, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge, suspend, or otherwise discriminate against any of you for supporting United Food and Commercial Workers Union, Local 1099, or any other labor organization, or for distributing union literature or other protected literature in nonworking areas during nonworking time.

WE WILL NOT enforce or maintain a rule that prohibits employees from distributing union literature or other literature pertaining to concerted protected activity in nonworking areas during nonworking time.

WE WILL NOT call the police or threaten to call the police to enforce a rule that prohibits employees from distributing union literature or other protected literature in nonworking areas during nonworking time.

WE WILL NOT enforce or maintain a rule that prohibits employees from being in employee break areas on the exterior of our stores more than 10 minutes before or 10 minutes after their shift.

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off-duty employees' *access* to the Respondent's property, we agree with the General Counsel that *Santa Fe Hotel & Casino* is the appropriate analysis. Applying that standard, we adopt the judge's finding that the Respondent unlawfully prohibited its off-duty employees from distributing union handbills to customers. We additionally adopt the judge's findings that on certain occasions the Respondent unlawfully prohibited off-duty employees from handbilling anywhere on the premises when there were locations in the shopping plazas where handbilling would have been permissible under either the Respondent's written or amended no-distribution rule.

There were also three occasions in which union handbills were distributed to employees as well as to customers. In agreement with the judge, we find that the Respondent unlawfully prohibited handbilling to customers on these occasions. The record does not show, however, any occasion where union handbills were distributed only to employees. Consequently, we do not reach the question of whether handbilling only to employees in any of the locations in question would have come within the scope of the Respondent's written prohibition against distribution to employees in working areas of the business.

[9] In finding that the discipline issued to Roberson and Reardon violated Sec. 8(a)(3), we adopt the judge's analysis and additionally rely on *Double Eagle Hotel & Casino*, 341 NLRB 112 fn. 3 (2004), enfd. as modified 414 F.3d 1249 (10th Cir. 2005), cert. denied 126 S.Ct. 1331 (2006).

[10] On October 10, 2002, Brown distributed union handbills to customers by the entrance of the Colerain Avenue store. The record indicates that Brown was stationed "fairly close" to products on display for sale. Brown stopped handbilling after the Respondent told her that she was violating the Respondent's orally amended no-distribution rule. The Respondent, however, suspended Brown for her handbilling conduct even though Brown had never before been told in which specific areas handbilling was impermissible under the Respondent's orally amended no-distribution rule. On November 26, 2002, Brown again distributed union handbills to customers at the Colerain Avenue store in an area approximately 10–15 feet from products on display. Brown was initially suspended and eventually discharged for her November 26 handbilling. Under *Double Eagle Hotel & Casino*, supra, Brown's October 10 suspension violated Sec. 8(a)(3) because it was imposed pursuant to an unlawfully amended rule as discussed above. Absent this unlawful suspension, Brown would not have been later discharged under the Respondent's progressive discipline policy. Thus, as the judge found, that discipline also violated Sec. 8(a)(3).

WE WILL NOT enforce or maintain a rule that prohibits employees from wearing quarter-sized or smaller buttons or pins above their nametags while working that demonstrate membership or support for any union.

WE WILL NOT tape record conversations with employees due to their union activities or coercively interrogate employees about their union activities.

WE WILL NOT maintain a confidentiality policy that could be interpreted as prohibiting employees from discussing salaries with anyone outside of the Company.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Karen Brown and Helen Reardon full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Amy Roberson, Tina Morgan, Karen Brown, and Helen Reardon whole for any loss of earnings and other benefits resulting from their unlawful discharge or discipline, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Karen Brown and Helen Reardon and to the unlawful discipline of Amy Roberson, Tina Morgan, Karen Brown, and Helen Reardon and, WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful discharges and discipline will not be used against them in any way.

WE WILL amend our confidentiality policy so as to clarify that employees are not prohibited from discussing salaries with anyone outside of the Company.

SUPERVALU HOLDINGS, INC. D/B/A BIGG'S FOODS

Naima R. Clarke, Esq., for the General Counsel.
Keith P. Spiller and *Eric S. Clark, Esqs. (Thompson, Hine LLP)*, of Cincinnati, Ohio, for the Respondent.
Peter M. Fox, Esq. (Kircher, Robinson & Welch), of Cincinnati, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on April 28 through May 1, and June 2 and 3, 2003. The charges were timely filed between April 1, 2002, and February 13, 2003 and the second consolidated complaint was issued on March 26, 2003.

This case primarily concerns handbilling by four of Respondent's employees; Tina Morgan, Amy Roberson, Karen Brown, and Helen Reardon, who are also union organizers. These individuals passed out union handbills in front of the entrances and/or exits of several Bigg's' grocery stores when they were off duty. In a number of instances, Respondent ordered these employees to refrain from handbilling and called the police when they refused to do so. Each of the four was disciplined for allegedly violating Biggs' no-solicitation/no-distribution rule. Brown and Reardon were ultimately terminated for distributing union literature outside of Respondent's stores. The General Counsel alleges that Respondent's no-solicitation/no-distribution rule violated Section 8(a)(1) of the Act and that the discharges of Brown and Reardon violated Section 8(a)(3) and (1) of the Act.

Respondent also terminated Morgan and Roberson. Morgan was fired for violating Respondent's confidentiality policy by posting sales information on the Union's website. Roberson was fired for giving her business card to another employee while both were on the clock at her cash register. The General Counsel does not allege that these terminations violated the Act, but contends that both were disciplined on earlier occasions in violation of Section 8(a)(3) and (1). Morgan was suspended for returning late from a break and Roberson received a written warning and a suspension for distributing handbills.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Bigg's Foods, a corporation, is a subsidiary of Supervalu Holdings, Incorporated. Bigg's operates a number of retail facilities in the Cincinnati, Ohio vicinity, from which it sells groceries and related products. It annually derives gross revenues from each of these facilities in excess of $500,000 and receives at each of these facilities goods valued in excess of $50,000 directly from places outside of the State of Ohio, or in the case of the Florence, Kentucky store, directly from places outside the Commonwealth of Kentucky. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, the United Food and Commercial Workers International Union (UFCW), Local 1099, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

In late January and/or early February 2002, pursuant to the settlement of previous unfair labor practice charges, Respondent hired four UFCW organizers. Three, Tina Morgan, Amy Roberson, and Karen Brown, were full-time employees of the Union. The fourth, Helen Reardon, is apparently a volunteer organizer for the Union. Morgan and Roberson were hired as front-line (checkout) cashiers at Bigg's Union Centre store in West Chester, Ohio. Morgan worked from about January 28, until April 1, 2002. Roberson worked from January 28 until mid-June 2002.

Reardon worked as a front-line cashier at the "Skytop," Ohio store from January 28 until December 3, 2002. Brown worked

in the bakery at Respondent's Colerain Avenue store in metropolitan Cincinnati from February to November 26, 2002. So far as this record indicates, the Union is not the authorized collective-bargaining representative of any Bigg's employees.

Respondent, by Chris Devers, the manager of its Florence, Kentucky store, violated Section 8(a)(1) of the Act on or about February 26, 2002, by tape recording a discussion with an employee concerning Respondent's work rules because the employee joined and assisted the Union and to discourage employees' union activities. Respondent, by Chris Devers, also violated the Act by interrogating an employee about the employee's union activities on February 26, 2002 (complaint pars. 5(a) and (b) and 11; stipulations at Tr. 17).

A. Tina Morgan's March 8, 2002 Suspension (Complaint Par. 10(a))

Respondent accords employees who work 4 to 6 hours in a day a 15-minute paid break. Employees working 6 hours or more are entitled to two 15-minute breaks. Employees working 8 hours or more are entitled to two 15-minute breaks and a 30-minute unpaid meal. Employees must clock in and out for breaks and meals.

Jenny Diehl, who supervised the front-line cashiers at Union Centre, began to enforce the breaktimes in mid-February 2002 after service desk employees advised her that breaks and lunches were falling behind schedule due to cashiers returning late. Front-line leads and employees under the age of 18 were exempted from Diehl's strict enforcement of the breaktimes.

Tina Morgan was 1-minute late in returning from her 15-minute break on February 12, 2002; 2 minutes late from returning from break on February 15, and 3 minutes late in returning from break on February 16. Diehl issued Morgan a "counseling" or written warning for these incidents on February 22, 2002 (GC Exh. 13). Several other employees were also issued counselings or written warnings at this time.

According to Diehl, one of the service desk employees at the Union Centre store came to her on the evening of Tuesday, March 5, to report that Morgan was late returning from break again. Morgan clocked out for break at 5:16 p.m. and clocked back in at 5:33 p.m., 2 minutes late. Diehl further testified that because of this report she pulled timeclock punches for front-line employees. On the basis of her review of the timeclock punches, she suspended Morgan for 1 day on March 8, 2002 (GC Exh. 14).

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) the activity was a substantial or motivating reason for the employer's action. Once the General Counsel makes this initial showing, the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981); *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002). The General Counsel and the Union allege that the discriminatory motive for Morgan's suspension is established by the disparate manner in which Respondent treated her tardiness compared with other employees.

I agree. Morgan was the only employee suspended for returning late from breaks, as opposed to being given a written warning.[1] Respondent distinguishes Morgan's case from other employees in that Morgan was suspended only after having been written up previously for returning late from breaks. However, I infer that because of its animus towards her union affiliation, Respondent was watching Morgan much more closely than other employees and seized upon the first opportunity to suspend her because she was a union organizer. Moreover, at least one other employee, Mary Jo Jones, who was not suspended, had a far worse punctuality record than Morgan. Respondent has made no credible argument for treating Morgan more severely than Jones.

I find Diehl's explanation as to how she was apprised of Morgan's tardiness on March 5 and why she only considered only late time punches prior to March 7 in implementing discipline incredible. At transcript 787 Diehl testified that the service desk employees "had expressed a concern because we were on [sic] telling the service desk employees to make sure breaks and lunches were running very smoothly." Thus, Diehl implies that an unnamed service desk reported to her when she noticed that Morgan had returned from break 2 minutes late on the afternoon of March 5.

I find that either Diehl was monitoring Morgan to catch her returning late from breaks or that she had specifically told service desk employees to advise her whenever Morgan was late. I draw this inference due to obvious lack of concern shown by Diehl and/or service desk employees with the punctuality of another front-line cashier supervised by Diehl, Mary Jo Jones.

During the period from February 10–16, Morgan was late returning from break three times; she and several other employees were given counselings or written warnings. Jones was late returning from break four times during this period and received no discipline.

While it's possible that Diehl merely overlooked Jones's tardiness for that week, Jones was late returning from break on four occasions during the week of February 17–23. Morgan was not late once during this period.

During the week of March 3–9, Morgan was late once—by 2 minutes; Jones' punctuality record for the week is as follows (GC Exh. 15(c)):

> Tuesday, March 5 (the day for which Morgan was suspended):
>
> Jones clocked in at 8:01 a.m. She went on break at 10:01; returned at 10:17 (one minute late).
>
> Jones clocked out for lunch at 11:59 a.m.; returned at 12:33 a.m. (four minutes late).
>
> Jones clocked out for break at 2:17 p.m., returned at 2:33 p.m. (one minute late).

[1] The disciplinary actions taken against Tammy Browning and Ryan Gabbard in April 2002 are not comparable. Browning was repeatedly late for work as well as late returning from break. Gabbard, on several occasions, did not show up for work without giving Respondent the required 2-hour notice so that it could find a replacement for him.

Thursday, March 7:

Jones clocked in at 8:01 a.m. She went on break at 9:56 a.m.; returned at 10:14 a.m. (three minutes late).

Jones clocked out for lunch at 11:54 a.m.; returned at 12:28 p.m. (four minutes late).

Jones clocked out for break at 2:41 p.m.; returned at 3:01 p.m. (five minutes late).

Friday, March 8, (the day Diehl suspended Morgan):

Jones clocked in at 8:00 am; she went on break at 10:03 a.m.; returned at 10:21 a.m. (three minutes late).

Jones clocked out for lunch at 12:00 p.m.; returned at 12:31 p.m. (one minute late).

Jones clocked out for break at 2:04 p.m.; returned at 2:20 p.m. (one minute late).

I conclude that Diehl and the service employees noticed Morgan's tardiness and ignored Jones' tardiness because they were closely monitoring Morgan but not Jones, because Morgan was a union organizer and Jones was not.[2] I conclude further that Respondent's monitoring of Morgan was motivated by its animus towards her activities on behalf of the Union.

The following week Jones was late from returning from break three times. Diehl issued her a written warning; rather than a suspension on March 23 (R Exh. 35). During the period from February 10 through March 16, 2002, Morgan was late returning from break four times for total of 8 minutes. Jones was late returning from break or lunch at least 23 times for at least 47 minutes. Jones had never been written up for late breaks prior to March 23. However, I find that Diehl and those reporting to her could only have been unaware of Jones' prolonged breaks only if they were paying close attention to Morgan and not to Jones, because of Morgan's union affiliation. I therefore conclude that Morgan's suspension violated Section 8(a)(3) and (1).

1. April 15, 2002

In early April, Bigg's suspended Morgan for violating its confidentiality policy by posting the gross sales figures for the Union Centre store on the Union's website. On May 2, Respondent fired Morgan for this reason.[3] In the interim, Morgan and Roberson began distributing handbills outside the entrances of several Bigg's stores.[4] The message on the handbills protested Morgan's suspension and alleged that it was motivated by her support for the Union.[5]

Morgan first distributed handbills protesting her suspension to customers and to some employees at one of the two entrances to the Florence, Kentucky store. Morgan positioned herself on the sidewalk about 10 feet in front of the entrance doors. She was about 10 feet from some plants that Bigg's displayed for sale outside of this entrance. The only employees working in the area were those moving shopping carts.

Annette Cheatham, the assistant store manager, approached Morgan and told her that she was violating Respondent's no-solicitation/no-distribution rule and that she would have to stop distributing her handbills. Morgan told Cheatham that she was an employee at Bigg's' Union Centre store. Cheatham told Morgan that if she didn't stop distributing the handbills she could be arrested. Cheatham then summoned Store Manager Chris Devers, who called the local police. When the police arrived, Morgan left.[6]

Morgan and Bill Dudley, the Union's director of strategic operations and organizing, then drove to the Union Centre store. Morgan began distributing handbills at the produce entrance. Respondent was not displaying any items for sale outside this entrance although bags of mulch were displayed outside the store some distance from where Morgan was handbilling.

After Morgan had distributed a handbill to one customer, Jenny Diehl, the operations manager at the Union Centre store, and Glenn Glazier, the grocery manager, approached her and told her that she was violating Respondent's no-solicitation/no-distribution policy and that they would call the police if she did not stop. They gave Morgan a letter from the owner of the Union Centre Pavilion dated April 9, 2002, stating that the owner had delegated to Bigg's the authority to prevent trespassing in the shopping center. Morgan wrote on this document that she received it on April 15. Store Manager Michael

[2] Kathy Hicks took a 37-minute lunchbreak on February 10 and a 45-minute lunchbreak on February 16. On February 26, Bigg's issued Hicks a written counseling for being late once returning from lunch during the week of February 10–16. On February 17, Hicks took a 43-minute lunchbreak and apparently nobody noticed that she was 13 minutes late returning from lunch. Hicks was 1-minute late in returning from break on March 3 and again on March 4, but Diehl apparently didn't notice or simply ignored this when she reviewed the timecards on March 8. Hicks received no additional discipline.

Patricia Retherford, who was late returning from her break or meal on nine different occasions in February, returned from her break 1-minute late on March 4 and 5. There is no evidence that Respondent had a policy of excusing a 1-minute deviation from an employee's breaktime. In fact, Morgan was counseled in part for being 1-minute late on February 12.

[3] The General Counsel does not allege that Bigg's violated the Act by discharging Morgan.

[4] Bigg's does not allege in any of these incidents that Morgan, Roberson, Brown, or Reardon blocked entry into its stores or interfered with the work of its employees. In almost all the incidents the only employees working in the vicinity of the handbillers, if any, were employees gathering carts from the parking lot. However, Biggs's' employees were required to work on items displayed outdoors. Collectively, employees could spend several hours per day watering and pruning plants displayed outside the stores. Outdoor displays of items such as pumpkins, apples, mulch, firewood, or ice melt had to be restocked, or reorganized periodically.

In every instance in which Biggs's' management employees approached handbilling employees, they were informed or already knew that they were Bigg's' employees. In all, or at least most of these instances, the Bigg's personnel also knew that Morgan, Roberson, Brown, and Reardon were union organizers, who were working pursuant to a settlement between the Union and Bigg's.

[5] This was the theme of all the handbills distributed by the Union in the spring of 2002 at Respondent's stores.

[6] I credit Tina Morgan's account of this incident where it conflicts with that of Annette Cheatham. In particular, I find it likely that Morgan and other union representatives left the Florence store only when the police arrived. This is consistent with their conduct in similar incidents.

Macaluso came out of the store and also told Morgan that Respondent would call the police if she continued to distribute handbills. Bigg's called the police and Morgan left.[7]

As of April 15, 2002, Bigg's solicitation and distribution policy provided in relevant part:

> 1. Solicitation for any cause and distribution of any materials by employees is prohibited at all times when one or more of the involved employees is on work time.
>
> 2. Employees may not distribute materials to other employees in working areas of the business.
>
> 3. Solicitation and/or the distribution of literature for political causes or gambling is prohibited at all times in all areas of the business. . . .
>
> 4. . . . .
>
> 5. Solicitation and/or the distribution on company premises by non-employees is prohibited at all times. . . .
>
> 6. The only exception to items 1 and 2 above, is company-sponsored charitable contributions such as the United Way Fund Drive. Solicitation for fundraising for matters such as any employee or a relative of an employee, a birth or death . . . may be conducted only with the advance approval of the Human Resources Department, or store manager in a retail business. . . .
>
> 7. Retail store managers may approve solicitation and/or distribution by nonprofit community organizations from time to time on an infrequent basis, provided that such activities are non disruptive and further the store's business and goodwill interests. [GC Exh. 4.]

The policy on its face does not prohibit off-duty employees from soliciting and distributing literature to customers or other nonemployees.

2. April 16, 2002

On April 16, Morgan went to Bigg's store in Western Hills with Bill Dudley. She then began distributing handbills outside of one of the entrances. Tom Brink, the store manager, approached Morgan. There is a conflict between the testimony of Morgan and Brink as to whether any items were displayed for sale nearby. Brink testified that there were plants near the entrance; Morgan testified that she saw no products for sale. I find it unnecessary to resolve this conflict. Even after Morgan informed Brink that she was a Bigg's' employee, he told Morgan that she could not distribute literature anywhere in the shopping plaza including the parking lot. At trial, Brink testified that she could have distributed literature in the employee break area outside the store, but that is not what he told her on April 16.

Morgan and Dudley then went to the Colerain store where Morgan again distributed handbills. Paula Meece, a human relations specialist at the store, approached Morgan and told her she was violating Respondent's no-solicitation/no-distribution policy. When Morgan refused to leave, Meece called the police. The officers responding to the call talked to Dudley who told them that Morgan had a right to distribute literature under the NLRA. The police officers declined to take any action other than asking Morgan to remove her company uniform; Morgan removed her Bigg's apron and nametag, turned her polo shirt inside out, and continued to handbill for another 10 minutes.[8] There were some plants displayed outside the store although it is not clear how close Morgan was to these items.

3. April 17, 2002

Morgan returned to Union Centre on April 17, 2002. Morgan went inside looking for Store Manager Mike Macaluso, but he was not at work. She talked to a management employee named Larry Poe instead and told him she intended to distribute handbills. Poe told Morgan she would have to handbill out by the street, off of Bigg's property. Morgan told Poe that he might want to call Mike Brooks, Bigg's director of operations.

Morgan went outside and stood near an entrance that was some distance from mulch that was on display. No products were displayed for sale at this entrance. Poe came outside about 10 minutes later. He told Morgan that he had spoken to Brooks and that she could stand at the entrance, but not to block it. Morgan cut Poe off and told him that she knew what she could do and what she couldn't do.

Respondent invokes the "Ten-Minute Rule" on April 17, 2002, to prohibit Roberson from waiting outside the Union Centre store more than 10 minutes before the start of her shift.

Soon after the September 11, 2001 terrorist attacks in New York and Washington, D.C., the Food and Drug Administration issued guidelines for protecting the nation's food supply from terrorists. These guidelines are recommendations and do not have the force of law.

Pursuant to these guidelines, and instructions from its parent company, Supervalu Holdings, Inc., Bigg's distributed to its employees new rules regarding food security in March 2002. One of these rules provides that:

> We welcome employees as customers. However, unless shopping, employees should not enter the store more than ten minutes before the start of their scheduled work shift and

[7] At Tr. 766, Jennifer Diehl testified that she first encountered Amy Roberson handbilling on Friday, April 19, 2002. Diehl did not contradict Morgan's testimony about her interaction with Morgan on April 15, and she conceded that she observed Morgan handbilling at the Union Centre store on a date she could not recall. Respondent did not call Glenn Glazier, who was still the grocery manager at Union Centre at the time of trial, and should also have been able to directly contradict Morgan about the events of April 15, if she was making them up. In contrast, the Union called Bill Dudley as a rebuttal witness to corroborate Morgan's testimony with regard to the events of April 15.

Similarly, Store Manager Michael Macaluso did not directly contradict Morgan regarding April 15; he essentially ignored it (Tr. 841). However, Macaluso's notes, Exh. R-43, suggest that April 18 was not the first occasion that Macaluso told Morgan not to handbill at his store. This note states, "I approached her and told her we have a no solicitation policy in the center, that this is the second time she is asked to leave and not return."

[8] Meece testified that she did not see Morgan prior to April 19 or calling the police. I credit Morgan. Her testimony and Meece's indicates that Exh. 10(c) was a photograph taken by Dudley of Morgan handbilling at Colerain on April 16. Morgan's testimony that Dudley went to Colerain with her on April 16 and not on April 19 is consistent with Dudley's absence from Respondent's videotape exhibit, R-12 taken on April 19, Exhs. R-10 and 11, and Meece's testimony that she had met Dudley.

should leave the store within ten minutes after the end of the scheduled work shift.

(GC Exh. 5, p. 2, *Daily Work Assignments*, par. 2.)

On April 17, 2002, Amy Roberson arrived at the Union Centre store at 9:30 a.m., one-half hour before the start of her work shift at 10 a.m. She went to the smoking break area outside of the store. Store Manager Mike Macaluso approached her and told Roberson she could not wait in the smoking area because of the new 10-minute rule.

4. April 18, 2002

Tina Morgan returned to Union Centre on April 18, 2002, to handbill and was met by Store Manager Mike Macaluso. Their testimony conflicts as to whether only mulch was displayed in the area in which Morgan attempted to handbill, or also, as Macaluso testified, bedding plants on pallets. In any event, Macaluso informed Morgan that she was not allowed to distribute literature anywhere in the shopping plaza and that if she persisted he would call the police. Morgan left the premises.[9]

The same day Morgan went to Respondent's Mason, Ohio store on Fields Ertel Road. Mike Bracken, the store manager, told Morgan she was not allowed to distribute literature where she was located and that he would call the police if she didn't stop. There is a conflict in testimony as to whether there were any items displayed for sale where Morgan was standing. At trial, Bracken testified that he would have allowed Morgan to handbill in the employee break area. He did not tell her this and she did not inquire as to whether there were any areas on the exterior of the store in which Respondent would allow her to handbill.

5. April 19, 2002

Amy Roberson distributed handbills at Union Centre on April 19.[10] She came within 4–6 feet of flowers and mulch that was displayed for sale. Roberson distributed a handbill to a Bigg's employee entering the store. Store Manager Mike Macaluso told Roberson that she could not distribute literature anywhere in the shopping plaza and that she could not distribute literature to employees who were on break.[11] There were areas in front of the store where no products were displayed for sale. Macaluso did not indicate to Roberson that she would be allowed to distribute handbills in these areas (Tr. 885). When Roberson persisted in handbilling, Macaluso called the police.

Bigg's issued Roberson a written warning for her violation of the Company's no-solicitation/no-distribution policy. Although Respondent has a progressive discipline policy in which a first offense usually is punished with a verbal warning, Bigg's gave Roberson a written warning on the theory that she had been apprised of its policies in orientation.

Macaluso refused to allow Roberson to work her shift on April 19. However, after he consulted with Operations Director Michael Brooks, Bigg's paid Roberson for the shift she missed. Morgan and Roberson drove from Union Centre to the Colerain Avenue store where they distributed handbills, at least one of which was handed to an employee going to work and one to a customer looking at flowers displayed outside the entrance. No employees were working in the area except those collecting shopping carts from the parking lot.

Store Manager Ron Gribbens told Morgan and Roberson they couldn't handbill and ultimately called the police. At trial Paula Meece testified that Morgan and Roberson would not have been in violation of Respondent's no-solicitation/no-distribution policy if they had handbilled in the parking lot or nonworking areas. However, on April 19, neither Meece nor Gribbens told either Morgan, Roberson, or the police that there was any area outside the store in which employees were allowed to distribute handbills.

6. April 23 or 24, 2002

Roberson distributed handbills at the produce entrance of the Union Centre store on April 23 or 24, 2002. Racks of flowers were displayed nearby. Mike Macaluso approached Roberson and told her she was not allowed to distribute handbills in the shopping plaza. He ultimately called the police and Roberson left. Bigg's suspended Roberson for 3 days as a result of this incident.

7. April 25, 2002

On April 25, 2002, Karen Brown, a union organizer who was working in the bakery at the Colerain store, handbilled for 15–20 minutes outside an entrance to that store in area in which no items for displayed for sale. Several management officials were aware of her presence and did nothing to stop Brown from handbilling.

8. May 7, 2002

On May 7, Brown attempted to handbill outside the produce entrance of the Colerain store. While there were no items displayed by the produce entrance, Brown at times approached flowers that were on display at the front of store (Tr. 248). Paula Meece and Store Manager Ron Gribbens approached Brown and told her she was violating Respondent's no-solicitation/no-distribution rule. She refused to leave until they called the police. When the police arrived, Brown left. Respondent did not discipline Brown as a result of this incident.[12]

B. May 18, 2002,—Store Manager Michael Macaluso Sends Amy Roberson Home for Refusing to Remove a Union Button From Her Shirt

On May 18, 2002, Amy Roberson wore a quarter-sized UFCW button above her nametag on her Bigg's polo shirt. While she was at her cash register, Store Manager Michael Macaluso approached Roberson and told her that she had to remove the button because she was a violating the company dress code. While Macaluso testified that he could not see

[9] Tr. 884, LL. 1–3 are mistranscribed. I asked Macaluso if he told Morgan that there were areas outside the store where she could solicit. He confirmed that he did not tell her that she was free to solicit at other locations on the exterior of the Union Centre store.

[10] Morgan met Roberson at Union Centre, but did not handbill. Store Manager Macaluso told Morgan she was not allowed anywhere in the shopping plaza.

[11] Macaluso did not contradict Roberson's testimony on this issue at Tr. 142.

[12] The statement in R. Br. 23, that Brown was suspended in October 2002 "because she had been previously warned in writing regarding handbilling a working area in May 2002," is incorrect (Tr. 213–214).

Roberson's button well enough to see that it was a union pin, I find that he knew it was a UFCW pin regardless of whether or not he could see it. Macaluso was aware that Roberson was a UFCW organizer who was working at his store pursuant to the settlement of previous unfair labor practice charges. He also had confronted Roberson recently for distributing handbills in front of his store on two occasions and had suspended her. Roberson refused to remove the button, arguing that other employees wore noncompany buttons on their uniforms and that there was no company rule prohibiting them.

Macaluso then walked down the cashier's line looking for cashiers who were wearing noncompany sanctioned insignias. Another cashier, Karen Gellison, was wearing a pin depicting hands folded in prayer. Macaluso told Gellison to take the pin off and she apparently did so. There is no evidence that Respondent ever enforced a rule prohibiting the wearing of such items previously, although several management employees were aware that employees wore noncompany pins while on duty [e.g., Tr. 212–213; Karen Brown wore a union button for an extended period at the Colerain store; Jenny Diehl saw Roberson with her union button at Union Centre and said nothing, Tr. 733]. Further, Respondent's dress code (R. Exh. 33, p. 17) does not either directly of indirectly suggest that the wearing of noncompany buttons is prohibited. I conclude that the first time Bigg's interpreted its dress code to prohibit buttons, pins or insignias was on May 18, when Macaluso noticed Roberson wearing what he knew was a union button.[13]

1. October 10, 2002

Karen Brown distributed union handbills at the produce entrance of the Colerain store on October 10, 2002. These handbills unfavorably compared the benefits accorded to Bigg's employees with those accorded unionized employees at other subsidiaries of Supervalu Holdings.[14] While pacing in front of the store, Brown came close to flowers displayed under the windows outside of the cashier's stations. The new store manager, Darryl Caldwell, and Human Relations Specialist Paula Meece approached Brown and told her that she was violating Respondent's no-solicitation policy. Meece told Brown that Respondent would call the police if Brown continued to distribute material; Brown refused to stop.

Caldwell and Meece went back inside the store and called Respondent's counsel. Afterwards, they went back outside and told Brown that she could not handbill in any of Respondent's selling areas. Brown did not distribute any literature on October 10, after being told that she could not distribute near any selling areas.[15] Caldwell and/or Meece told Brown that she could distribute material by the pharmacy entrance, where no items were displayed. Brown did not distribute by the pharmacy entrance.

October 10 was the first occasion that Respondent informed any representative of the Union as to what it considered to be a working area in which the distribution of union literature by employees was forbidden and what was a nonworking area in which employees could distribute literature. Prior to this date, Bigg's either said nothing, merely told the union employees they were in a working area, or told union representatives that they were prohibited from distributing their literature anywhere on the exterior of the stores. On October 11, Respondent displayed items for sale in front of the pharmacy entrance as well in front of the produce entrance.

On October 19, Bigg's issued Brown a 3-day suspension for violating its no solicitation/no distribution rule on October 10. She had previously received a 1-day suspension for wearing a T-shirt to work that said, "Bigg's violates workers rights" instead of her company uniform shirt. There is no evidence that Brown violated Respondent's written solicitation and distribution policy. There is no evidence, for example, that she distributed a handbill to any employee.

2. October 16, 2002

On October 16, 2002, Helen Reardon, a voluntary union organizer working at Respondent's "Skytop" store, distributed handbills in front of the grocery entrance to that facility.[16] The grocery entrance was one of four entryways into the store and was the primary entrance. Reardon stood on the sidewalk in front of the entrance 5–10 feet from pumpkins and other produce displayed by the doors.

Store Manager Chad Sanders approached Reardon and told her to stop distributing handbills. Reardon told Sanders that she was entitled to distribute literature in nonworking areas. Sanders replied that the area in which she was standing was a working area. When Reardon refused to leave, Sanders called the police. It is clear from Sanders' testimony and his notes of the incident that he considered any location on Bigg's property to be a "working area." He told the police, and they told Reardon that she could distribute handbills only on Beechmont Avenue, a public street (Tr. 673–674; R. Exh. 28). Respondent suspended Reardon for 3 days as a result of this incident. She had previously been suspended for 1 day for leaving work early.

Unlike other store managers or Biggs's management officials, Sanders concedes that he allows some charitable organi-

[13] There is no evidence that Roberson lost any pay as the result of being sent home early for refusing to remove the union button. The General Counsel has not alleged that an 8(a)(3) violation with regard to this incident.

Roberson was fired on June 2, 2002, for giving her business card to another employee while both were on duty. The General Counsel has not alleged that Roberson's discharge violated the Act—although at first glance it appears unlikely that Respondent would have fired Roberson for this incident had she not previously received two suspensions, which the General Counsel alleges were illegal.

[14] The contrast between benefits for Bigg's employees and those at unionized stores of Supervalu subsidiaries was the theme of all the handbills distributed by Brown and Reardon during the fall of 2002.

[15] Caldwell at Tr. 495 testified that when he initially approached Brown, he told her she was not allowed to distribute her literature because she was in a selling area. However, his testimony at Tr. 496 and his notes of October 10 (Exh. R-24), Meece's testimony and notes (Tr. 422; Exh. R-15) make it clear that neither Caldwell nor Meece drew the distinction between selling areas and nonselling areas when they first confronted Brown. Moreover, Meece's notes corroborate Brown's testimony that when Caldwell and Meece told her that she could not distribute in selling areas, Brown "said ok and left."

[16] These handbills had the same or similar message to those distributed by Brown.

zations to solicit on store property with his permission (Tr. 647). When Sanders confronted Reardon and talked to the police he gave no indication that there was anywhere on Biggs's property she would be allowed to distribute literature. At trial, he testified that he would not have allowed Reardon to distribute in front on the grocery entrance even if she stood on the asphalt surface in the fire lane of the parking lot. He opined that she would still be in a "working area" because the mums on display would only have been 8 feet from her.

3. October 22, 2002

Karen Brown and Helen Reardon distributed handbills at an entrance to Biggs's' "Ridge and Highland" store on October 22, 2002. Respondent did not have any products displayed outside of this entrance when they arrived. Store Manager Robert Miller approached Brown and Reardon and told them that he would call the police if they did not stop distributing the handbills. Miller then went back into the store and shortly thereafter an employee moved bins of pumpkins from another entrance to the one at which Brown and Reardon were standing. Brown and Reardon left a few minutes later.[17]

4. November 7, 2002

On November 7, 2002, Karen Brown distributed handbills at the pharmacy entrance to the Colerain Avenue store. There were no items displayed for sale at this entrance and Respondent made no effort to stop her.

5. November 14, 2002

Karen Brown went back to the Ridge and Highland store on November 14, 2002, and distributed handbills. Biggs's was not displaying any items for sale in the area in which she was pacing. Bernie Schlesinger, a store manager, approached Brown and told her that she could not distribute handbills because she was in a selling area. When Brown asked what items Biggs's was selling in the area, Schlesinger mentioned a newspaper vending machine from which USA Today was sold.[18] Brown left shortly thereafter.

6. November 26, 2002

Brown handbilled again at Colerain on November 26, 2002. Brown was as close as 3–4 feet to items being displayed on sale. Store Manager Darryl Caldwell approached Brown and demanded that she stop. Brown refused and Caldwell called the police.

Shortly after Brown reported for her work shift on the same day, Bigg's suspended her. On December 6, it terminated her employment for violating its no-solicitation/no-distribution policy on November 26. As was the case in the October incident, there is no evidence that Brown violated Bigg's written solicitation and distribution policy by giving a handbill to an employee in a working area.

7. December 3, 2002

Helen Reardon distributed handbills again in front of one of the exit doors at the Skytop store on December 3, 2002. Pumpkins, firewood, and other items were displayed for sale outside of these doors. Reardon was somewhere in the vicinity of 4–10 feet from the doors and the products for sale, standing on the sidewalk. Store Manager Chad Sanders demanded that she stop distributing handbills, Reardon declined and Sanders called the police. When the police arrived Reardon left. Bigg's terminated Reardon for violating its no-solicitation/no-distribution rule on December 3.

C. Is Respondent's No-Solicitation/No-Distribution Rule Valid as Written and Enforced?[19]

At issue is the validity and Respondent's enforcement of its rule that "employees may not distribute materials to other employees in working areas of the business." Respondent's written rules against solicitation and distribution did not prohibit the distribution of literature by off-duty employees to customers or other nonemployees. While, absent a discriminatory motive, Bigg's could have amended this rule, either orally or in writing, it only did so in response to handbilling by the Union.[20] Thus, even if Respondent could otherwise promulgate such a rule, I find that the rule is illegal due to its discriminatory motive, *Youville Health Care Center*, 326 NLRB 495 (1998); *State Chemical Co.*, 166 NLRB 455 (1967). The fact that the "oral rule" against promulgation by employees to customers was discriminatory is established by the fact that Bigg's never disseminated such a rule to all its employees; it only disseminated it to the discriminatees when it discovered them distributing literature to customers outside its stores.

Respondent's no-solicitation/no-distribution policy makes an exception for "company-sponsored charitable contributions such as the United Way Fund Drive." It also allows solicitations conducted with the prior approval of the human resources department for fund-raising campaigns conducted on behalf coworkers on the occasions of such events as a birth, death, etc.

The Supreme Court stated in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), that an employer may validly post his property against nonemployee distribution of union literature . . . if [it] does not discriminate against the union by allowing other distribution. The Board has held that an employer violates Section 8(a)(1) of the Act when it prohibits labor organizations from distributing literature while discriminating in favor of certain charitable organizations, *Albertson's, Inc.*, 332 NLRB 1132 (2000). Board law provides an exception for "a small number of beneficent acts," *Hammary Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982). Respondent's policy which on its face

[17] Brown and Reardon's account of this incident is uncontroverted. Miller, who still worked for Biggs's at the time of the hearing in this matter, did not testify (Tr. 969–970).

[18] Michael Brooks, Respondent's operations director, testified that he considered only those areas in which products are displayed which are stocked by Bigg's employees, to be working areas. Thus, areas in which only newspaper or soft drink vending machines are present would not be a working area and employees would be free to distribute union literature within those areas.

[19] Despite the repetitive use of the word solicitation, the parties herein agree that the instant case only concerns the distribution of literature at the exterior of Respondent's stores by employees.

[20] Skytop employee Patti Wesselman received a verbal warning on August 29, 2002, for soliciting customers for her personal business *while on the clock*; a clear violation of Respondent's no-solicitation/no-distribution rule as written (Exh. R-27).

gives Respondent unfettered discretion to allow distribution by charities it favors is overly-broad and violates the Act under current Board law.

On the other hand, the United States Court of Appeals for the Sixth Circuit [the circuit in which this case arises] explicitly sanctioned some discrimination against union distribution in *Cleveland Real Estate Partners v. NLRB*, 95 F. 3d 457 (6th Cir. 1996)—at least insofar as the owners of private commercial premises forbid handbilling by "nonemployee" union organizers engaged in nonorganizational informational activity directed at the general public.[21] However, the court has not applied this rule to discrimination against union activity by employees. In at least two cases, *Meijer v. NLRB*, 130 F.3d 1209, 1213–1217 (6th Cir. 1997); and *NLRB v. St. Francis Healthcare Center*, 212 F.3d 945, 958–969 (6th Cir. 2000), the court enforced Board orders finding an 8(a)(1) violation against employers who in the absence of compelling special circumstances, forbid employees from wearing union pins, while allowing employees to wear nonlabor related company-approved pins.[22] The Sixth Circuit has also held that an employer who tries to forbid employees from distributing literature in nonwork or mixed areas during nonworking time violates the Act, *United Parcel Service v. NLRB*, 228 F.3d 772 (6th Cir. 2000).

Restrictions that apply to nonemployee union organizers are at least in some circumstances illegal when employed to organizers or other individuals who are employees of the employer. In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1956), the Court held that employers are generally entitled to bar nonemployee union organizers from their property. However, the *Lechmere* decision does not apply to the distribution of union literature by employees, *Nashville Plastic Products*, 313 NLRB 462 (1993).[23] The controlling Board case with regard to the distribution of union literature by employees is *Tri-County Medical Center*, 222 NLRB 1089 (1976). The Board found that Tricounty violated Section 8(a)(1) in preventing an employee from distributing union literature in front its hospital and in the rear parking lot on a day when he was not scheduled to work.

The Board held that an employer's rule which denies access to off-duty employees [and inferentially their right to distribute literature] is valid only if (1) it limits access solely with respect to the interior of the plant *and other working areas* (emphasis added); (2) is clearly disseminated to all employees; and (3) applies to off-duty employees for any purpose and not just to those employees engaging in union activity. The Board concluded that, "except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates and other outside nonworking areas will be found invalid."

The *Tri-County* decision makes it clear that there may be areas on the exterior of an employer's premises to which an employer can deny access to off-duty employees and prevent them from distributing union literature. Left open, however, by the Board and by Respondent's no-distribution/no-solicitation rule is the issue of what constitutes an outside work area.

In *Santa Fe Hotel & Casino*, 331 NLRB 723 (2000), the Board held that an employer may not effectively destroy the right of employees to distribute literature by categorizing as a work area entrances to its facility where the activities performed are incidental to its main function. In that case, the employer had argued that the entrances to its gambling casino were work areas on account of security, maintenance, and gardening activities that employees performed at these entrances.[24]

The Court of Appeals for the Sixth Circuit, however, appears to allow employers to prohibit outdoor handbilling on the basis of minimal work activity. In *Pikeville United Methodist Hospital v. Steelworkers*, 109 F.3d 1146, 1157 (6th Cir. 1997), the court found that the employer could prohibit employee handbilling at the front entrance of a hospital because patients were dropped off there and, thus, the entrance constituted a "work area."

On balance, I find that under certain conditions Respondent could prohibit employees from distributing union literature in front of its stores in areas in which products are displayed for sale without violating the Act.[25] However, Respondent would also have to prohibit all noncompany related distribution in such areas and clearly disseminate its rule to all employees, *Tri-County*, supra.

With the exception of the October 10 and November 26, 2002 incidents at the Colerain store, Respondent enforced its no-distribution rule in an overly broad manner to include areas on the outside of the stores where no items were displayed for sale and where no work was being performed. This includes its

[21] While I read the holding of *Cleveland Real Estate Partners* to apply only to distribution by "nonemployee organizers," the discussion at 95 F.3d at 465, certainly suggests that the court may also allow a property owner, who allows solicitation and distribution by charitable organizations, and/or the distribution of other nonlabor relations material, to discriminate against employees who are distributing union literature to the general public.

[22] The United States Court of Appeals for the District of Columbia Circuit, which might also review the instant matter, has found that discrimination in favor of non labor-related solicitation/distribution violates Sec. 8(a)(1), *Lucile Salter Packard Children's Hospital v. NLRB*, 97 F.3d 583, 587 and fn.4 (D.C. Cir. 1993).

[23] An organizer who works for an employer is an "employee" within the meaning of the Act, *Town & Country Electric*, 516 U.S. 85 (1995).

At p. 38 of its brief, Respondent suggests that the *Lechmere* holding may, or should be, extended to off-duty employees as well as nonemployees. If so, there will be little left of employee Sec. 7 rights, since employees at work can only distribute literature at break and meal times.

[24] Respondent states at p. 43 of its brief that handbilling to discourage customers from shopping at Bigg's is not entitled to the same level of protection as more traditional Sec. 7 activities, citing *Jean Country*, 291 NLRB 11, 14 (1988). First of all, *Jean Country* involved solicitation by nonemployee organizers, rather than employees. Secondly, there is no distinction between the Sec. 7 right to solicit employees and nonemployees, *Stanford Hospital & Clinics v. NLRB*, 325 F.3d 334, 343 (D. C. Cir. 2003); *Santa Fe Hotel & Casino*, supra. "The right of employees to distribute union literature during nonworktime and in nonwork areas is not limited only to distribution to prospective union members. Employees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor organizations," *NCR Corp.*, 313 NLRB 574, 576 (1993).

[25] It is unnecessary for me to decide whether Respondent could prohibit employee distribution of union literature in an area in which the only products displayed were items such as propane tanks or firewood, which may require very infrequent attention by Bigg's employees.

prohibition of distribution in the employee smoking areas on the exterior of the buildings. Thus, I find that Respondent violated Section 8(a)(1) in maintaining an enforcing an overly broad no distribution rule since April 15, 2002. Although, I find that a valid rule was communicated to Karen Brown on October 10, 2002, at the Colerain store, a valid rule was never generally disseminated or communicated to employees.

D. Respondent Violated the Act in Threatening to Call the Police and/or Calling the Police as Alleged in Complaint Paragraph 7

Respondent violated Section 8(a)(1) in threatening to call the police and/or calling the police to enforce an invalid, overly-broad no-distribution rule on every occasion alleged in paragraph 7 of the complaint:

> April 15, 2002 at the Florence, Kentucky store;
> April 15, 2002 at the Union Centre store;
> April 18, 2002 at the Union Centre store;
> April 18, 2002 at the Mason (Fields Ertel Road) store;
> April 19, 2002 at the Colerain Avenue store;
> April 24, 2002 at the Union Centre store;
> May 7, 2002 at the Colerain Avenue store;
> October 10, 2002 at the Colerain store [Paula Meece threatened to call the police before she told Karen Brown that she was only prohibited from distributing literature in selling areas];
> October 16, 2002 at the Skytop store;
> October 22, 2002 at the Ridge and Highland store;
> November 26, 2002 at the Colerain store;[26]
> December 3, 2002 at the Skytop store.

Respondent also violated the Act as alleged in complaint paragraph 8, when Thomas Brink and Michael Macaluso told the employee/organizers that they could not distribute union literature anywhere on the property of the shopping center in which the Western Hills and Union Centre stores were located.

Respondent violated Section 8(a)(3) and (1) of the Act in issuing a written warning to Amy Roberson on April 22, 2002, and suspending her on April 26, 2002. It violated the Act in suspending Karen Brown on October 19, 2002, and suspending Helen Reardon on October 19, 2002. Bigg's also violated the Act is discharging Karen Brown and Helen Reardon in December 2002.

Under current Board law it is not clear whether any discipline taken under an overly broad no-solicitation/no-distribution rule is lawful. Given that fact, I will apply the law as stated by former Chairman Hurtgen in *Mt. Clemens General Hospital*, 335 NLRB 48 fn. 2 (2001), enfd. 328 F.3d 837 (6th Cir. 2003), and former Member Cowen in *Baptist Medical Center/Health Midwest*, 338 NLRB 346, 349 fn. 17 (2002). Under certain limited circumstances, an employer may take disciplinary action against an employee pursuant to a rule that is invalid if it makes it clear that it is enforcing the rule in a manner that is not overly broad.

On October 10, Respondent clearly explained to Karen Brown which areas on the exterior of its Colerain store it deemed to be a working area and which areas it deemed to be nonworking areas. However, I conclude that all discipline issued to the discriminatees as the result of their handbilling violated the Act. As noted previously, Respondent's written rules against solicitation and distribution did not prohibit the distribution of literature by off-duty employees to customers or other non-employees. Bigg's illegally "amended" its rule orally in response to handbilling by the Union, *Youville Health Care Center*, 326 NLRB 495 (1998); *State Chemical Co.*, 166 NLRB 455 (1967). The fact that the "oral rule" against promulgation by employees to customers was discriminatory is established by the fact that Bigg's never disseminated such a rule to all its employees; it only disseminated it to the discriminatees when it discovered them distributing literature to customers outside its stores.

Even assuming that Respondent lawfully disciplined Brown after the November 26 incident, it did not lawfully discharge her. Brown was discharged because she had been disciplined twice before. The 3-day suspension Bigg's gave to Brown on October 19 for handbilling on October 10 was unlawful. Brown did not distribute literature on that day after she was informed that she was in a working area and that she was only prohibited from distributing literature in working areas where no products were being sold. Had Brown not received the suspension in October, she would not have been terminated pursuant to Respondent's progressive discipline system in December.

All other disciplinary actions taken by Respondent for violations of its no-solicitation/no-distribution rule were unlawful also because they were taken pursuant to an overly-broad rule that was communicated in its illegal manner to the employees. The illegal disciplinary actions include: Amy Roberson's April 22 written warning, Roberson's April 26 suspension, the October 19 suspension of Reardon, and the December termination of Reardon The General Counsel has not alleged that Roberson's discharge in June was illegal. However, it is clear that Roberson would not have been discharged for handing an employee her business card while both were on the clock but for previous disciplinary actions, which were unlawful.

Roberson was given a written warning April 22 for handbilling on April 19 (GC Exh. 17). Respondent skipped the verbal warning step in its progressive discipline program because it had informed Roberson of its no-solicitation/no-distribution policy at her orientation in January 2002. However, a lawful no-solicitation/no-distribution rule was never communicated to Roberson. Roberson received a 3-day suspension for handbilling on April 24. She apparently was not disciplined for wearing her union button in May but was fired in June for distributing her business card while working at her cashier's station.

Respondent was entitled to discipline Roberson for the June incident, but it is highly unlikely that Roberson would have been fired in June but for the unlawful written warning and unlawful suspension in April. The testimony of Jenny Diehl, the Bigg's supervisor who administered discipline to Roberson, strongly suggests that Roberson would not have been fired in

[26] On November 26, Karen Brown was distributing literature in a working area after having been informed on October 10, by Respondent that distributing literature in a selling/working area was prohibited—but that distribution elsewhere did not violate its rule. However, there is no evidence that Brown violated Respondent's written no distribution rule by distributing handbills *to employees* in a working area.

June had that been her first violation of Respondent's no-solicitation/no-distribution rule. Nevertheless, I cannot find a violation of the Act because Roberson's discharge may not have been fairly and fully litigated (See Tr. 776).

E. Respondent Violated Section 8(a)(1) by Prohibiting Amy Roberson From waiting in the Outside Employee Break Area More than 10 Minutes Before the Start of Her Shift on April 17, 2002

When Store Manager Michael Macaluso prohibited Amy Roberson from waiting in the outside employee break area a half-hour before her shift began on April 17, he invoked a rule that by its terms applies only to the interior of the store. Respondent has not demonstrated any business reason that justifies it in denying Roberson access to the area, *Tri-County*, supra. For example, there is no indication that prohibiting off-duty employees from this area had any relationship to protecting the nation's food supply from terrorists. Moreover, I find that Macaluso, who knew Roberson was a union organizer and who had prohibited Tina Morgan from distributing union literature anywhere in the Union Centre shopping plaza 2 days earlier, was motivated by antiunion animus in ordering Roberson to leave this area. Therefore, I find Bigg's by Michael Macaluso violated Section 8(a)(1) on April 17, 2002, and continues to violate the Act insofar as it denies off-duty employees access to outside nonworking areas more than 10 minutes before or after their shift.

F. Respondent Violated the Act by Orally Promulgating on May 18, 2002, and Maintaining a Rule at its Union Center Store Prohibiting Employees From Wearing Union Pins During Working Time

First of all, I find that Michael Macaluso promulgated Respondent's rule against the wearing of noncompany insignias on May 18, 2002, as a reaction to observing Roberson's union pin. Thus, even if Respondent could otherwise promulgate such a rule, I find that the rule is illegal due to its discriminatory motive, *Youville Health Care Center*, supra; *State Chemical Co.*, supra.

Moreover, employees have a protected right to wear union insignia, *Holladay Park Hospital*, 262 NLRB 278, 279 (1982). An employer may not lawfully restrict employees from wearing union insignia unless it demonstrates the existence of "special circumstances," such as where the display of such insignia unreasonably interferes with a public image which the employer established as part of its business plan through appearance rules for its employees, *United Parcel Service*, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994); *NLRB v. Autodie, International, Inc.*, 169 F.3d 378, 383 (6th Cir. 1999).

Employee contact with customers, in of itself, does not justify a prohibition of union insignia. The legality of the prohibition depends on a number of factors, one of which is the size of the insignia, *Produce Warehouse of Coram*, 329 NLRB 915 (1999). Other things being equal, a quarter-size union pin worn above an employee's nametag does not establish a "special circumstance" justifying a Respondent in prohibiting such insignias. In this case, Bigg's has not made the showing necessary to prohibit Roberson from wearing her button, *Meijer, Inc. v. NLRB*, 130 F.3d 1209, 1215 (6th Cir. 1997).[27]

G. Did Respondent's Confidentiality Policy When Read in Conjunction with its Data Confidentiality Statement Violate the Act?

Paragraph 6(b) of the complaint alleges that since about May 14, 2002, Respondent has maintained a rule prohibiting employees from discussing their salaries with persons who are not employed by Respondent. However, the theory of a violation in the briefs of both the General Counsel and the Charging Party is quite different. Essentially, they argue Respondent violated Section 8(a)(1) of the Act by requiring employees to sign a data confidentiality agreement, which when read in conjunction with its confidentiality policy, subjects employees to discipline for discussing salaries with anyone outside the Company.

Respondent's confidentiality policy (GC Exh. 2(a)) states that information regarding sales volumes, profit margins, advertising, promotional plans, financing, *salaries*, future expansion, information from personnel records, and other confidential data are considered to be particularly vulnerable to the kind of disclosure that would allow competitors to compete unfairly with Bigg's (emphasis added). The policy provides that Bigg's:

> reserves the right to have employees agree to sign a statement of non-disclosure as a condition of their employment. This statement simply promises that employees will not share any information such as that listed to anyone outside the company.

The confidentiality policy is reviewed with all new Bigg's employees at least at the Union Centre and Forest Fair stores (Tr. 1011–1012). New employees are then required to sign a data confidentiality statement. In this statement the employee acknowledges that he or she will be exposed to sensitive and confidential information which could include, *but is not limited to* profitability, sales data, promotional plans, budget data, business plans, personnel records, and payroll records. The confidentiality statement, unlike the confidentiality policy, does not specifically mention salaries. The employee agrees not to divulge "this information in any manner which might be detrimental to the conduct of Bigg's business" and acknowledges that failure to abide by the conditions of the confidentiality statement could be grounds for discipline (GC Exh. 2(b)).

I find that Respondent violated Section 8(a)(1) in maintaining a confidentiality policy, which on its face suggests that an employee could be disciplined for divulging salary information to persons, not associated with Bigg's. Even without the data confidentiality statement, an employee could interpret Respondent's reservation of the right to have employees agree to sign a statement of nondisclosure as an indication that discipline might result from disclosing salary information to persons outside of Bigg's.

Moreover, when the confidentiality policy and the data confidentiality statement are considered together, as they were in

[27] The *Meijer* court distinguished the decision in *United Parcel Service v. NLRB*, 41 F.3d 1068 (6th Cir. 1998), by the fact that UPS had the sole right under its collective-bargaining agreement to promulgate and enforce appearance standards.

employee orientations, an employee would most likely be left with the impression that he or she could be disciplined for discussing salaries with anyone outside of Bigg's, including union representatives. As a result, Bigg's maintenance of its confidentiality policy standing alone and considered in conjunction with the data confidentiality statement, violates the Act, *IRIS, U.S.A., Inc.*, 336 NLRB 1013 (2001). The instant case is distinguishable from *Super K-Mart*, 330 NLRB 263 (1999), relied upon by Respondent, in that Bigg's confidentiality policy specifically mentions salaries whereas Kmart's' policy did not.

CONCLUSIONS OF LAW

1. Since April 15, 2002, Respondent has violated Section 8(a)(1) of the Act by orally promulgating, maintaining and enforcing a rule prohibiting employees from distributing union literature during nonworking time, in nonworking areas on the exterior of its Colerain, Florence, Mason, Ridge and Highland, Skytop, Union Centre, and Western Hills stores. It also illegally and discriminatorily promulgated and enforced a rule forbidding off-duty employees from distributing literature to customers or other nonemployees at the exterior of its stores.

2. On May 18, 2002, Respondent violated Section 8(a)(1) by orally promulgating a rule prohibiting employees from wearing union pins during their working time at its Union Centre store.

3. Respondent has violated Section 8(a)(1) by threatening to call the police and calling the police to have employees arrested for trespass because they distributed union literature during nonworking time at the exterior of its stores on the following dates in the following locations:

April 15, 2002 at the Florence, Kentucky store;
April 15, 2002 at the Union Centre store;
April 18, 2002 at the Union Centre store;
April 18, 2002 at the Mason (Fields Ertel Road) store;
April 19, 2002 at the Colerain Avenue store;
April 23 or 24, 2002 at the Union Centre store;
May 7, 2002 at the Colerain Avenue store;
October 10, 2002 at the Colerain store [Paula Meece threatened to call the police before she told Karen Brown that she was only prohibited from distributing literature in selling areas];
October 16, 2002 at the Skytop store;
October 22, 2002 at the Ridge and Highland store;
November 26, 2002 at the Colerain store;
December 3, 2002 at the Skytop store.

4. Respondent violated Section 8(a)(1) in telling employees they could not distribute union literature anywhere on the property of the Western Hills shopping center on April 16, 2002, and on the property of the Union Centre shopping center on April 18 and 19, 2002.

5. Respondent violated Section 8(a)(1) on April 17, 2002, by telling Amy Roberson that she could not enter the break area on the exterior of the Union Centre store more than 10 minutes before the start of her shift.

6. Respondent violated Section 8(a)(3) and (1) of the Act in:

(a) Issuing a written warning to Amy Roberson on April 22;
(b) Suspending Amy Roberson on April 26;
(c) Suspending Karen Brown on October 19, 2002;
(d) Suspending Helen Reardon on October 19, 2002;
(e) Discharging Karen Brown in December 2002; and
(f) Discharging Helen Reardon in December 2002.
(g) Suspending Tina Morgan on March 8, 2002.

7. Respondent, by Chris Devers, the manager of its Florence, Kentucky store violated Section 8(a)(1) of the Act on or about February 26, 2002, by tape recording a discussion with an employee concerning Respondent's work rules because the employee joined and assisted the Union and to discourage employees' union activities. Respondent, by Chris Devers, also violated the Act by interrogating an employee about the employee's union activities on February 26, 2002.

8. Respondent has violated Section 8(a)(1) at all times relevant to this case in maintaining a confidentiality policy that an employee could reasonably interpret to prohibit the discussion of salaries with anyone outside of Bigg's.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

ORDER

The Respondent, Supervalu Holdings, inc. d/b/a Bigg's Foods, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, suspending or otherwise discriminating against any employee for supporting United Food and Commercial Workers International Union, Local 1099, or any other union, or for distributing union or other protected literature in nonworking areas during nonworking time.

(b) Enforcing and maintaining its overly broad no-distribution rule insofar as it prohibits employees from distributing union literature during nonworking time in nonworking areas at its Western Hills, Mason, Colerain, Florence, Union Centre, Ridge and Highland, and Skytop stores.

(c) Enforcing and maintaining its illegal prohibition of the wearing of union buttons at its Union Centre store.

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Enforcing and maintaining its illegal prohibition against employees waiting in the outside break area of the Union Centre store before and after their work shifts.

(e) Calling the police and threatening to call the police to enforce its overly broad no-distribution rule at its Western Hills, Mason, Colerain, Florence, Union Centre, Ridge and Highland, and Skytop stores.

(f) Tape recording conversations with employees because of union activities and coercively interrogating employees about union activities.

(g) Maintaining an overly broad confidentiality policy, which could be interpreted as prohibiting employees from discussing salaries with anyone not affiliated with Respondent.

(h) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Karen Brown and Helen Reardon full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Amy Roberson, Tina Morgan, Karen Brown, and Helen Reardon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Amend its confidentiality policy so as to clarify that employees are not prohibited from discussing salaries with anyone outside of Bigg's.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline and/or discharges of Amy Roberson, Tina Morgan, Karen Brown, and Helen Reardon, and within 3 days thereafter notify them in writing that this has been done and that the discipline and/or discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Western Hills, Mason, Colerain, Florence, Union Centre, Ridge and Highland, and Skytop stores copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 26, 2002.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 26, 2003.

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, suspend or otherwise discriminate against any of you for supporting United Food and Commercial Workers International Union, Local 1099, or any other union, or for distributing union or other protected literature in nonworking areas during nonworking time.

WE WILL NOT enforce or maintain a rule that prohibits employees from distributing during nonworking time in nonworking areas, union literature or other literature pertaining to concerted protected activity.

WE WILL NOT call the police or threaten to call the police to enforce a rule that prohibits employees from distributing union or other protected literature during nonworking time in nonworking areas.

WE WILL NOT enforce or maintain a rule that prohibits employees from being in employee break areas on the exterior of our stores more than ten minutes before or 10 minutes after their shift.

WE WILL NOT enforce or maintain a rule that prohibits employees from wearing quarter-sized, or smaller buttons or pins above their nametags while working that demonstrate membership or support for any union.

WE WILL NOT tape record conversations with employees due to their union activities or coercively interrogate employees about their union activities.

WE WILL NOT maintain a confidentiality policy which could be interpreted as prohibiting employees from discussing salaries with anyone outside of Bigg's.

WE WILL, within 14 days from the date of the Board's Order, offer Karen Brown and Helen Reardon full reinstatement to their former jobs or, if those jobs no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Amy Roberson, Tina Morgan, Karen Brown, and Helen Reardon whole for any loss of earnings and other benefits resulting from their discharge or unlawful discipline, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Karen Brown and Helen Reardon, and to the unlawful discipline of Karen Brown, Helen Reardon, Tina Morgan, and Amy Roberson and, WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and unlawful discipline will not be used against them in any way.

SUPERVALU HOLDINGS, INC. D/B/A BIGG'S FOODS